IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 462.

IN THE MATTER

*of*

RICHARD A. KNIGHT, An Attorney.

## BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## TABLE OF CONTENTS.

## Table of Citations.

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### Opinion Below.

The opinion disbarring petitioner is reported in 264 App. Div. 106 (First Dept., 1942).

Petitioner's motion in the Appellate Division for leave to appeal to the Court of Appeals was denied by order reported in 264 App. Div. 852 (First Dept., 1942). Petitioner's motion in the Court of Appeals for leave to appeal to that court was denied by order reported in 289 N. Y. (No. 187) i (1942) (Advance Sheets).

A motion of the Bar Association to dismiss the appeal to the Court of Appeals purportedly made as of right by petitioner was granted by an order reported at 290 N. Y. 327 (1943) (Advance Sheets).

## Questions Sought to Be Raised.

1. Whether the proceeding in which petitioner was disbarred was initiated and conducted in accordance with the requirements of due process.

2. Whether the order disbarring petitioner violated his right of free speech.

## Statutes Involved.

Sections 88 and 476 of the Judiciary Law, enacted as Chapter 30 of the Consolidated Laws of New York by L. 1909, c. 35, the relevant portions of which are set out below.

## Statement.

Petitioner seeks to have this Court review on alleged constitutional grounds a unanimous order dated May 8, 1942, of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, disbarring the petitioner from practicing law in the State of New York for conduct prejudicial to the administration of justice (R. 2 to 4).

Two applications for review of the disbarment order by the Court of Appeals of the State of New York have been denied and an appeal therefrom, allegedly taken as of right, has been dismissed by that court (R. 267, 277).

The disciplinary proceeding below was occasioned by petitioner's writing and wide publication of six documents containing grave charges against judges of courts of the State of New York (R. 6 to 113, 117 to 121, 239 to 250). These documents charged the judges with gross corruption in the performance of their judicial functions. Selected

specimens of these charges against the judiciary of the State of New York are set forth in the *per curiam* opinion of the court upon which the order disbarring the petitioner was made (R. 245 to 246).

Prior to the commencement of the disciplinary proceeding and shortly after publication of certain of the documents containing the charges made by the petitioner against the judiciary of the State of New York, the Appellate Division of the Supreme Court of the State of New York, First Department, by an order dated April 28, 1941, caused a judicial inquiry to be made into the charges which were being publicly uttered by the petitioner. This proceeding was conducted before Honorable Samuel I. Rosenman, a Justice of the Supreme Court of the State of New York. In the report, dated July 30, 1941, made and filed by Mr. Justice Rosenman in said proceeding, it was recommended that disciplinary action be taken against the petitioner by reason of his writing and wide publication of the aforesaid charges (R. 7 to 8, 87, 101).

Accordingly, the Executive Committee of the Association of the Bar of the City of New York appointed John T. Cahill as its attorney to commence this disciplinary proceeding under Sections 88 and 476 of the Judiciary Law of the State of New York. Petitioner was personally served with a notice of motion and petition, verified December 24, 1941, returnable before the Appellate Division of the Supreme Court of the State of New York, First Department, on January 9, 1942 (R. 5 to 11, 114 to 115, 116, 122, 223, 250, 268 to 269, 271 to 272).

The petition in the disciplinary proceedings charged the petitioner herein with conduct prejudicial to the administration of justice by reason of his writing and wide publication of the six documents annexed to such petition containing

attacks on the integrity of judges of courts of the State of New York (R. 6 to 113, 117 to 121, 243 to 244).

Upon consideration of said petition, the Appellate Division, by its order dated January 31, 1942, designated the Honorable Charles B. Sears, Official Referee of the Court of Appeals of the State of New York, to take testimony with respect to said charges of professional misconduct on the part of the petitioner herein and to report thereon to that court (R. 114 to 115).

The hearing before the Official Referee was held on March 10, 1942, on notice to the petitioner (R. 116 to 117). The petitioner did not appear at this hearing, either in person or by counsel (R. 117, 250).

In his report, dated March 23, 1942, the Official Referee found that the evidence adduced established the writing and wide publication by the petitioner herein of each of the six documents annexed as Exhibits "A" to "F" to the petition. The Official Referee further found the petitioner herein guilty of conduct prejudicial to the administration of justice as charged in the petition (R. 117 to 121).

Upon the filing of this report, the Bar Association moved for its confirmation, and the petitioner herein submitted an affidavit in opposition to such confirmation (R. 220 to 221, 222 to 238). In a *per curiam* opinion, the petitioner herein was found unfit to continue as a member of the Bar of the State of New York, and it was directed that he be disbarred (R. 239 to 250). The order of disbarment, dated May 8, 1942, was made and entered on such opinion (R. 2 to 4).

After entry and service of the unanimous order of disbarment, the petitioner made a motion in the Appellate

Division for leave to appeal to the Court of Appeals of the State of New York. That motion was denied by unanimous order of the Appellate Division, dated June 19, 1942 (R. 267).

Thereafter, the petitioner made a motion in the Court of Appeals of the State of New York for leave to appeal to that court. Such leave to appeal was denied by an order of the Court of Appeals dated October 8, 1942 (R. 267).

On July 7, 1942, the petitioner had also served a notice of appeal, dated June 23, 1942, from the unanimous order of disbarment, thereby purporting to institute an appeal to the Court of Appeals of the State of New York as of right. On motion of the Bar Association, and after hearing thereon, this appeal was dismissed by an order dated June 10, 1943, of the Court of Appeals, on the ground that no substantial constitutional question was involved (R. 267, 277).

## POINT I.

**The petition herein does not raise a substantial Federal question.**

The power of the courts of the State of New York to discipline attorneys admitted to practice before them is not open to question. So long as the requirements of due process of law are observed in the sense that the attorney concerned is given notice and an opportunity to be heard, it is clear that this Court will not review the determination of the state court with respect to the qualifications of that attorney to practice before it. *Selling* v. *Radford,* 243 U. S. 46 (1917); *Keeley* v. *Evans,* 271 Fed. 520 (D. Ore. 1921), *appeal dismissed* 257 U. S. 667 (1922).

**A. Petitioner was accorded due process of law.**

**i. The disciplinary proceeding was conducted pursuant to statutes fulfilling all requirements of due process.**

The disciplinary proceeding resulting in the petitioner's disbarment was a statutory proceeding under the provisions of Sections 88 and 476 of the Judiciary Law of the State of New York, commenced by the Bar Association in accordance with the recommendation of the court in the judicial inquiry which had previously been made concerning the charges the petitioner was making against the New York judiciary (R. 7 to 8, 87, 101).

The applicable provisions of Sections 88 and 476 of the Judiciary Law of the State of New York read as follows:

> "§88. *Admission to and removal from practice by appellate division*
>
> * * * * * *
>
> 2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.
>
> "§476. *Suspension or removal of attorney must be on notice*

Before an attorney or counsellor at law is suspended or removed as prescribed in section eighty-eight of this chapter, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any district attorney within a department, when so designated by the presiding justice of the appellate division of the supreme court, to prosecute all proceedings for the removal or suspension of attorneys and counsellors at law or the said presiding justice may, in a county wholly included within a city or in a county having a population of over three hundred thousand inhabitants, appoint an attorney and counsellor at law, designated by a duly incorporated bar association approved by him, to prosecute any such proceedings and, upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor at law for the services rendered under such designation, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

In all cases where the charges are served in any manner other than personally, and the attorney and counsellor at law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, decree or final order of suspension or removal and upon good cause shown and upon such terms as may be deemed just by such presiding justice such

attorney and counsellor at law must be allowed to defend himself against such charges."

The requirements of due process are satisfied by the provisions of the statutes quoted above directing that a copy of the charges preferred be served upon the attorney personally (or by mail, or by publication or otherwise, as the presiding justice of the appellate division may direct in a proper case), and that he be given an opportunity to be heard in his defense (Section 476 of the Judiciary Law of the State of New York, *supra*).

**ii. The requirements of due process contained in the applicable statutes were complied with in the disciplinary proceeding.**

In his application for certiorari the petitioner does not raise any issue either as to service of the charges upon him, or as to the opportunity of being heard in his own defense. He does not challenge the fact that he was personally served with the charges preferred against him and that he received notice of the time and place of all court proceedings with respect to such charges, including the return date of the original petition, the hearing before the Official Referee designated to take testimony and report to the court on the charges preferred, and the return date on the motion to confirm the Official Referee's Report wherein the petitioner was found guilty of conduct prejudicial to the administration of justice on all six of the documented charges set forth in the original petition.

The petitioner complains that the disciplinary proceeding below was initiated by notice of motion and verified petition, rather than by an order to show cause, a procedural distinction without a difference.

Since at least 1912, when Sections 88 and 476 of the Judiciary Law of the State of New York were enacted sub-

stantially in their present form, the Bar Association has consistently presented charges of professional misconduct against attorneys to the court by way of petition, setting forth the charges and notice of motion thereon. The following excerpt taken from the opinion of the Court of Appeals in *Matter of Dolphin,* 240 N. Y. 89 (1925), removes all doubt about the current practice:

> "The association is incorporated and its purposes as defined by the act of incorporation are, amongst others, those of 'facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession.' It is a matter of common knowledge that under these powers and through appropriate organization it has done constant and valuable work in maintaining the ethical standards of the legal profession in New York City and in bringing to the attention of the Appellate Division various members of the profession who, in its opinion, had violated those standards and were deserving of discipline. Such work has been ordinarily done as it was in this case by presenting to the court a petition alleging misconduct of an offending member and, if the court thought that a sufficient cause for so doing was presented, by prosecuting charges before a referee on whose report, if adverse to the attorney, the matter would be brought before the court for final disposition." (p. 93)

In any event, the attempted distinction between a verified petition and notice of motion and an order to show cause presents no constitutional question to this Court.

In like manner, the questions which the petitioner raises in his application as to whether counsel for the Bar Association acted pursuant to formal designation of the presiding justice of the Appellate Division, and whether the initiation of the disciplinary proceeding by the Bar Association

should have been authorized by its Grievance Committee, rather than by its Executive Committee, present narrow procedural issues having nothing whatever to do with any substantial constitutional issue of due process.

Moreover, the regularity of the disciplinary proceeding has been twice reviewed by the Court of Appeals of the State of New York. That Court, after review of the record, denied the petitioner's application for leave to appeal from the unanimous disbarment order and in a second review dismissed an appeal therefrom taken purportedly as of right *on the ground that no substantial constitutional question was presented by the record* (R. 267, 277).

Finally, petitioner, in Point III of his brief, seeks to avail himself of the fact that in the six documents on which the charges against him were based, he attacked the Appellate Division, First Department, in which Department all of the documents were written and published. Petitioner argues that thereby the Appellate Division was disqualified. Petitioner does not call attention to the fact that in another document, marked for identification in this record, he also assailed the integrity and honesty of the judges of the Court of Appeals (R. 164). Petitioner's argument seems to assume that if he attacks enough judges and enough courts, he can thereby escape the discipline which his acts would otherwise entail. By parity of reasoning, if the integrity of *all* the courts of the United States were attacked by a lawyer, who when given his day in court to prove his charges failed even to present himself, then such a lawyer would forever be immune from professional accountability.

**B. Petitioner's rights of free speech were not infringed.**

The law is clear that the petitioner, in the disciplinary proceeding against him, had the burden of establishing the

truth of his vicious attacks on the honesty and integrity of the judges of the New York courts.

The case of *In re Murray*, 11 N. Y. Supp. 336, 58 Hun 604 (Gen. Term, 1st Dept., 1890) is precisely in point. In that case, an attorney had charged a Surrogate with being an infamous, foresworn and corrupt judge. In disciplinary proceedings brought against him for this conduct he failed to offer evidence, other than by allegations in an affidavit, of the truth of the charges and was disbarred. The Court in its opinion stated:

> "The charges are most serious in character, and would be attended with the gravest results if established. They should not therefore be entertained for a moment *except upon the most impressive evidence at least, and then only in the manner provided by law for the investigation of kindred accusations against judicial officers.* These results impose the greatest and most scrupulous care even in an attempted impeachment of a judicial officer, and if a counselor of this court, disregarding that mode of procedure, makes the charge of corruption against an officer in his own court, while sitting in a case which he is investigating, his conduct is in the highest degree unprofessional and improper. If such a performance should be tolerated, *when every presumption of law is against the truth of the accusation*, the honor of judicial officers would be exposed to the malice or rage of disappointed attorneys whose evil inclinations, anger or passion would thus seek its gratification. * * *" (p. 336) (Italics supplied.)

The *Murray* case was followed in *Bar Association of San Francisco* v. *Philbrook*, 170 Pac. 440 (Dist. Ct. of Appeals, 1st Dist. Cal., 1917) where an attorney had made attacks on the integrity and honesty of various judges and accused them of joining with members of the Bar in a

criminal conspiracy. He was charged with unprofessional conduct for violation of his duty to maintain the respect due to courts of justice. He refused to make any defense on the merits to the charges. The Court, citing *In re Murray, supra,* with approval, disbarred the attorney stating that such conduct on the part of an attorney:

> "* * * affords ample ground for the permanent disbarment of such a person, especially when neither justification, withdrawal, mitigation, or excuse for the making and filing of such a document has been proffered by the respondent in the proceedings now pending before us." (p. 442)

Again in the case of *Cobb* v. *U. S.,* 172 Fed. 641 (C. C. A. 9th, 1909), an attorney procured publication of an article attacking the reputation of a judge. He asserted that the article was not willfully or maliciously or otherwise false or untrue, but failed and refused to adduce any evidence to justify the attacks he had made. The appellate court, in sustaining an order suspending him from practice for eighteen months, stated:

> "The plaintiff in error admitted in his answer that he wrote the communication and sent the same to the publisher, but he denied that he did so willfully or maliciously, or that the article was willfully or maliciously or otherwise false or untrue, or that he had any intent to scandalize or traduce or disgrace the court. Upon the issue so raised, the plaintiff in error might, had he so chosen, have adduced testimony to sustain his denials, but upon the refusal of the court to refer the case to a committee of three members of the bar the plaintiff in error by his counsel announced in open court that he would not further appear in the case, or have anything further to do with the same. The burden was upon him to show that statements made in the communication

> which were scandalous upon their face were not maliciously or willfully published, or were not false, and he cannot complain that upon his refusal to sustain such burden of proof, or to adduce any testimony whatever, the court took the information to be true. (p. 644)
>
> * * * * * *
>
> "These are charges which no attorney with a proper sense of his professional duty would make unless he were prepared to prove and sustain them." (p. 645)

It is thus apparent, both from the application for certiorari and from the record below, that there is no issue of freedom of speech involved in this case. The petitioner has been disciplined by a court of competent jurisdiction, after notice and a full opportunity to be heard in his defense, for his behavior in making and widely publishing scurrilous attacks upon the integrity of the judges of the courts of the State of New York, for the making and publishing of which he failed, when given the opportunity, to offer any evidence whatever either in justification or mitigation.

## Conclusion.

**The application to this Court for a writ of certiorari is wanting in merit and should therefore be denied.**

Respectfully submitted,

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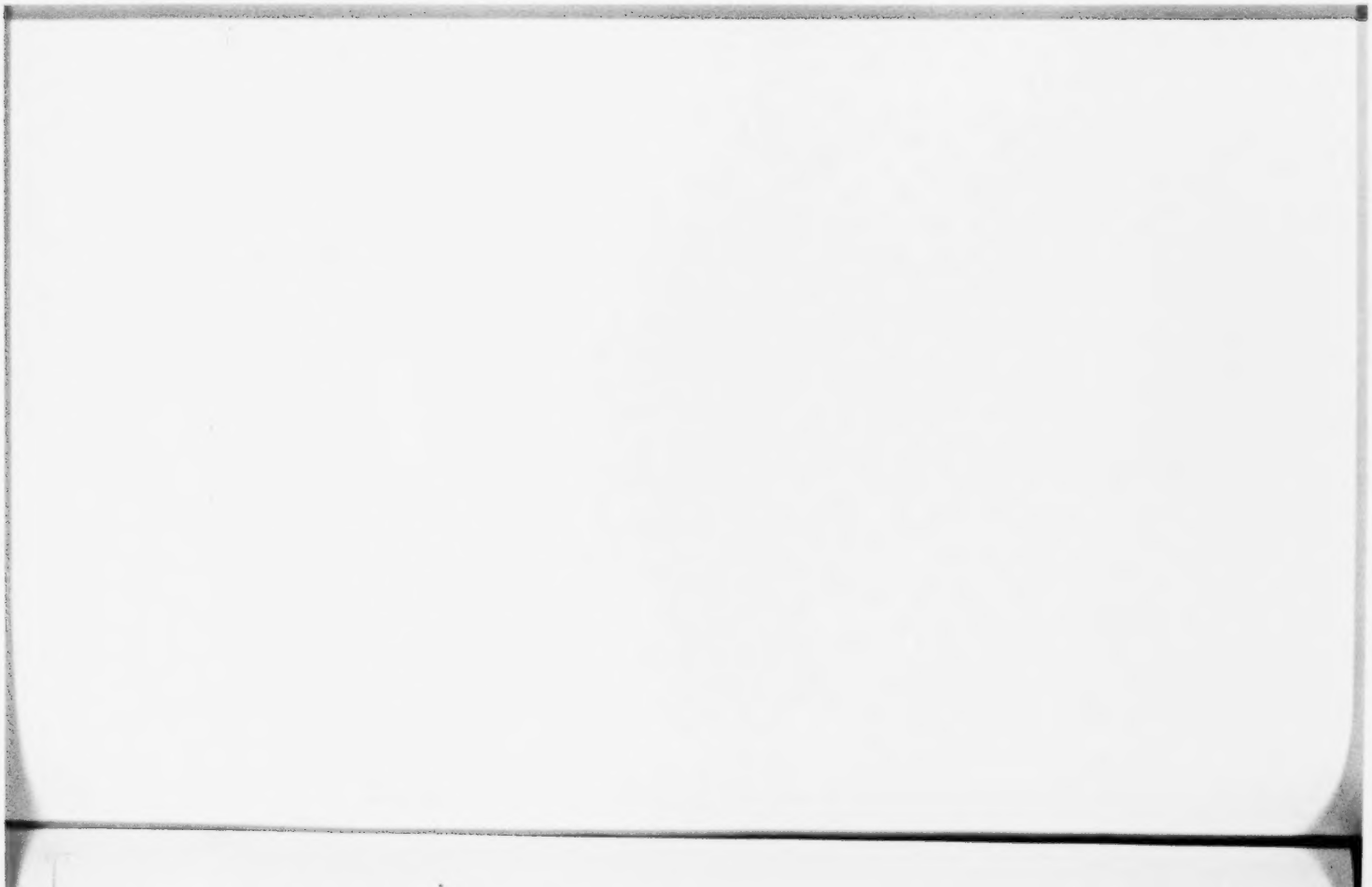

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RICHARD A. KNIGHT,

*Petitioner,*

AGAINST

THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

**Reply Brief in Support of Petition for Writ of Certiorari to the Court of Appeals of the State of New York.**

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# INDEX.

## Cases Cited.

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**A.**

In respect of Petitioner's Point II that there was a violation of his right to due process by reason of the Appellate Division's having entertained a disciplinary proceeding instituted by the Association with a Notice of Motion instead of by the Court itself with an Order to Show Cause, the attempt is made by the Association in Point I—A ii (p. 8) of its answering brief to dismiss petitioner's argument with the airy statement that it raises "a procedural distinction without a difference". It is hereby respectfully suggested, however, that it does no such thing. No question of procedure is even suggested by it.

The point is that the Association was wholly without power, *as a matter of substantive law,* to institute the

proceeding by *any* procedure whatever,—as wholly without such power as any other association, club or civic body or individual would have been,—and that the Appellate Division was, therefore, wholly without jurisdiction to entertain and conduct the proceeding.

The power to institute such a proceeding against a lawyer is allocated by *statute* to the Appellate Division exclusively, just as the power to conduct a similar proceeding against an accountant or a dentist is allocated by statute to the Board of Regents of the University of the State of New York.

Under such circumstances, it is as preposterous for the Association to claim that it has a legal right to institute a proceeding of this kind against a lawyer as it would be for it to claim it had the right to institute a similar one against an accountant or a dentist.

And for the Court, having had the circumstances called to its attention by petitioner's motion to dismiss made at the beginning of the proceeding, nevertheless to have proceeded with it and to have made a decree in it is precisely as preposterous as would have been its conduct if, in a proceeding for divorce and custody instituted by a Mrs. Smith of New Jersey against a Mr. Jones of Connecticut, who and whose children had never seen and/or heard of Mrs. Smith, it had proceeded to take evidence and enter a decree awarding the divorce and the custody to Mrs. Smith even though, at the commencement of the proceeding, Mr. Jones had appeared specially and laid the undenied facts before it in a motion to dismiss.

The Brief of the Association attempts to offer no justification whatever for its having arrogated to itself a power not only not given to it by law, but specifically denied it by law other than that (p. 8) "since at least 1912 when Sections 88 and 476 of the Judiciary Law of the State of New York were enacted substantially in their present form, (*sic*) the Bar Association has consistently

presented charges of professional misconduct—by way of petition—and notice of motion thereon". Insofar as this quoted statement implies that in 1912 some change was made in those portions of Sections 88 and 476 of the Judiciary Law pertaining to the question here presented, which tended to justify the conduct of the Association, the statement is intentionally deceptive since, in fact, no such change has been made since prior to the year 1877.

And its statement (p. 9) that the Court of Appeals in *Matter of Dolphin,* 240 N. Y. 89 (1925) "removes all doubt about the current practice" being as the Association contends it is, is likewise deliberately deceptive since *Matter of Dolphin* clearly holds precisely the reverse.

It is elementary that a decree in a proceeding which a Court is without authority to entertain is a total nullity.

In *Matter of Will of Walker,* 126 N. Y. 20 (1892), cited in our original brief, the Court of Appeals said:

> "The objections to this decree are jurisdictional. The consent of the parties is not sufficient to avoid their fatal effect. Wherever there is a want of authority to hear and determine the subject matter of the controversy, an adjudication upon the merits is a nullity and does not estop an assenting party. Citing 8 N. Y. 245—*Chemung Canal Bank* v. *Judson.*"

In *Matter of Doey,* 224 N. Y. 30 (1918), the same Court held (p. 38):

> "The rule is well settled that a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise jurisdiction in a case to which the statute has no application, does not acquire jurisdiction and its judgment or determination when made is a nullity and will be so

> treated whenever called in question by either a direct or collateral attack. (*Risley* v. *Phenix Bank of the City of New York*, 83 N. Y. 318; *State of Rhode Island* v. *Comm. Massachusetts*, 12 Peters 657.)"

The same position was taken by the Court in *Matter of Newham* v. *Chile Exploration Co.*, 232 N. Y. 37 (1921). *Cf.* also *Matter of Samson*, 265 A. D. 259 (1942), cited and digested in full in our original brief (p. 19).

**B.**

The only answer the Association has proved able to make to the petitioner's claim that his rights to free speech and to a free press have been abridged by the interpretation put by the court below on the statute involved is that (p. 10) "The law is clear that the petitioner * * * had the burden of establishing the truth of his vicious (*sic*) attacks on the honesty and integrity of the judges of the New York courts."

This position, however, the Association has failed to sustain by the citation of a single decision of a court of superior jurisdiction, those decisions being uniform that an attorney is disciplinable only for those attacks on the judiciary which are deliberately false or made "without reasonable grounds".

That this is the law in New York was clearly laid down in *Matter of Bevans*, 222 A. D. 701 (1927) where in a disciplinary proceeding brought against a lawyer for instituting an action against various persons, including a judge, all of whom he accused of corruption, the Appellate Division, Third Department, held:

> " * * * no attorney is justified in bringing an action against any person or group of persons *without reasonable grounds* therefor * * *. The question

of fact then is *whether the respondent had reasonable grounds* to institute said action for conspiracy."

In that case, as in all similar cases recorded in the reports of the State, the attorney was disciplined *only* upon the finding of the Referee that his attacks upon the members of the judiciary "are and were wholly and utterly false and untrue" and that he himself had "no reasonable or just grounds to believe the said charge so made to be true".

In the very case principally relied on here by the Association to sustain its position, namely, *Cobb* v. *U. S.*, 172 Fed. 642 (C. C. A. 9th, 1909), the charges filed against the attorney involved squarely contained the allegation that his accusations were "willfully and maliciously false" and the Court, in the opinion upon which his disbarment was based, specifically found that the accusations were "false, scurrilous and libelous".

Although the Association, in its answering brief, has at last characterized petitioner's letters (top line, p. 11) as "vicious" and (15th line, p. 13) as "scurrilous", it is significant that those characterizations are the first it has to date indulged in, its original charges having been scrupulously free from any imputation that the publications of petitioner were vicious, scurrilous or, most of all, false, since it well knew that such an imputation would have elicited complete proof of the truth of the publications to the cost of its own principal officers.

As to the statement in the last paragraph on page 13 of the answering brief that "The petitioner has been disciplined * * * for his behavior in making and widely publishing scurrilous attacks upon the integrity of the judges of the Courts of the State of New York for the making and publishing of which he failed, when given the opportunity *to offer any evidence whatever* either in justifi-